JD-86-05
Pawtucket, RI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

IZZO ELECTRIC & SON

and 1—CA—41706

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 99,
AFL—CIO

Elizabeth A. Vorro, Esq., for the General Counsel.
Thomas J. McAndrew, Esq., of Providence, Rhode Island,
for the Respondent.
John P. Shalvey, of Cranston, Rhode Island,
for the Charging Party.

SUPPLEMENTAL DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. On September 30, 2004, the General Counsel issued a complaint alleging that Izzo Electric & Son (the Applicant) violated Section 8(a)(3) and (1) of the National Labor Relations Act by refusing to hire, or consider for hire, 11 applicants for employment because those persons had engaged in protected union activities and for the purpose of discouraging employees from engaging in such activities. The Applicant denied the commission of any unfair labor practices and a trial was held before me on February 15, 2005,[1] in Pawtucket, Rhode Island.

After receipt of briefs filed by the General Counsel and the Applicant, I issued a decision on May 31. Applying the analytical test established by the Board in *FES*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), I concluded that the General Counsel had met his burden of demonstrating that the Applicant was hiring electricians and that 10 of the applicants named in the complaint met the required qualifications for employment. I further found that the General Counsel did not meet his burden of showing that unlawful animus formed a material or significant part of the reason for the Applicant's failure to hire these individuals. Finally, I concluded that the General Counsel had failed to meet his burden of showing that the Applicant had refused to consider any of the named individuals for employment. As a result, I recommend that the complaint be dismissed. No exceptions were filed, and the Board adopted my findings and recommendation by Order of July 29.

[1] All dates are in 2005 unless otherwise indicated.

On August 23, counsel for the Applicant filed an Application for Attorney's Fees and Expenses pursuant to the Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325 (the Act) and Section 102.143 of the Board's Rules and Regulations. At the direction of the Board, by Order dated August 30, the Executive Secretary referred this application to me for appropriate action. The Applicant filed a supplement to its submission on September 7.[2] On October 18, counsel for the General Counsel filed a Motion to Dismiss Application for Costs and Attorneys' Fees under the Equal Access to Justice Act.[3]

The General Counsel's motion raises both procedural and substantive grounds for dismissal of the application.[4] For the reasons I will shortly discuss, I conclude that the General Counsel's positions as to both the Applicant's compliance with required procedures and the substantive merits of the application are well-founded. I will address each in turn.

1. The General Counsel's procedural objections to the application.

As required by Congress,[5] the Board has established detailed procedures for the submission of applications under the Act. These are found in the Board's Rules at Sections 102.143 through 102.155. The General Counsel contends that the Applicant has failed to comply with various critical aspects of these requirements.

In evaluating the General Counsel's procedural arguments, I have taken into account several overall considerations arising from the nature of the legislation. Shortly after passage of the original version of the Act, the Fifth Circuit described its remedial purpose, noting that it embodies a recognition that, "the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority." *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 427 (5th Cir. 1982). The Court also noted that the Act represents a "compromise position" balancing the protection of parties' rights to seek vindication with the executive's duty to see that the laws are faithfully executed. 672 F.2d at 429. For this reason, the Act does not grant a broad right of recovery to all successful litigants against the government. Instead, it provides a carefully delineated remedy to a particular economic stratum of litigants.

Given the nature and objectives of the Act, two general principles of statutory construction require that implementation of its provisions be kept within relatively narrow confines. The Board has noted that the Act represents a relinquishment of the Government's sovereign immunity. As a result, it must be strictly construed. *Monark Boat Co.,* 262 NLRB 994 (1982), affd. 708 F.2d 1322 (8th Cir. 1993). Similarly, the Supreme Court has observed that the Act constitutes a departure from "the general rule that each party to a lawsuit pays his or her own legal fees." *Scarborough v. Principi*, 541 U.S. 401, 404 (2004), citing *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975).

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[2] By order dated September 21, I granted General Counsel's motion for an extension of time in which to respond to the Application.

[3] The Applicant did not file any response to the motion to dismiss within the time period established by the Rules. See, Rule 102.150(a).

[4] While the inclusion of substantive defenses in a motion to dismiss strikes me as a bit unusual, I recognize that this procedure has been specifically approved by the Board. *Meaden Screw Products Co.,* 336 NLRB 298, 298—299 (2001). Given my conclusions regarding the proper disposition of this matter, the Board's methodology has certainly promoted efficiency in this particular case.

[5] 5 U.S.C. § 504(c)(1).

With these considerations in mind, I will turn to the General Counsel's specific procedural points. First, counsel for the General Counsel notes that the Applicant has failed to comply with the requirement of Section 102.147(a) that the application contain the number, category, and work locations of the applicant's employees and a brief description of the nature of the company's business. Having examined both the application and its supplement, I find that the General Counsel is correct. Standing alone, I do not believe that this deficiency should be sufficient to defeat recovery without providing an opportunity to make a correction to the application. My original decision contained a description of the general nature of the Applicant's business, including a finding that it employed approximately 38 persons in the trade at the time of the events at issue. As a result, it seems unlikely that development of a fuller record would reveal a complement of staff in excess of the Act's jurisdictional limit of 500 employees.[6] Furthermore, the Supreme Court has demonstrated a willingness to permit amendment of a timely filed application that contained minor deficiencies. See, *Scarborough v. Principi,* supra, at 406 (failure to include required allegation regarding the government's lack of substantial justification may be cured by amendment).[7] However, given my conclusions regarding the General Counsel's substantive objections to this application, allowance of such a curative amendment here would be pointless.

More significantly, the General Counsel notes that the application fails include a statement meeting the Rule 102.147(f) requirement of "a detailed exhibit showing the net worth of the applicant . . . provid[ing] full disclosure of the applicant's . . . assets and liabilities." Once again, review of the application and its supplement shows that the General Counsel is correct. Unlike the failure to provide information about the size of its complement of employees, this omission is serious and troubling. The information is vital to the proper assessment of the Applicant's financial eligibility for relief. There is nothing in the trial record that sheds significant light on whether the company meets the jurisdictional requirement that its net worth not exceed $7 million.[8] Furthermore, the Board has held that, even if it appears "harsh" to do so, an application should be dismissed if it fails to include an applicant's, "accurate and properly authenticated evidence of its net worth in order to satisfy the burden of eligibility that Congress has imposed." *Industrial Security Services,* 289 NLRB 459 (1988).

In addition to the failure to submit basic financial information required to establish entitlement to relief under the Act, the General Counsel notes that the application and its supplement fail to contain the essential "written verification under oath or under penalty of perjury that the information provided in the application is true." Rule 102.147(e). As just indicated, the Board has required that an application include evidence of financial eligibility that is "properly authenticated." 289 NLRB at p. 459. I need not address the question of whether a curative amendment of such crucial informational and verification requirements should be permitted under the holding in *Scarborough v. Principi*, supra, since I consider the General Counsel's substantive objection to the Application to be clearly dispositive.[9]

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[6] 5 U.S.C. § 504(b)(1)(B).

[7] I also note that, very recently, the Board affirmed an administrative law judge's decision declining to require an applicant to supplement an application on the issue of eligibility where, "it is obvious that the Applicant is EAJA eligible and the denial of knowledge and information by the General Counsel does not appear to be reasonably based." *Arizona Mechanical Insulation, LLC,* 345 NLRB No. 106 (2005), slip op. at p. 4.

[8] 5 U.S.C. § 504(b)(1)(B).

[9] I note, however, that in a decision affirmed by the Board, *Dake Structural Engineering and Rebar Co.,* 293 NLRB 649, 649—651 (1989), another administrative law judge opined that he had discretion to permit an additional filing but declined to exercise such discretion in favor of an

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Finally, counsel for the General Counsel raises some objections to the quality of the documentation of the fees and expenses sought by the Applicant. Unlike the situation involving other procedural issues, the application does contain a large body of supporting documentation regarding those fees and expenses. Given my conclusions about the General Counsel's substantive objection to the application, I need not address the specific controversies involving the documentation submitted as to fees and expenses.

As to matters of procedure, I conclude that the application and its supplement fail to comply with the Board's Rules and Regulations in matters both large and small. For reasons I will now discuss in detail, it is not necessary to address the somewhat thorny problem of whether to permit curative amendments of the application's major deficiencies.

2. The General Counsel's substantive objection to the application.

Counsel for the General Counsel's primary line of defense is her contention that a review of the General Counsel's actions throughout the course of this litigation demonstrates that his office did not engage in the misconduct that Congress was addressing through the provisions of the Act. My own analysis leads me to the same conclusion.

At the outset, I note that the General Counsel bears the burden of proof as to this issue. In setting the parameters for the scope of the inquiry, the Board has held that,

> [t]o meet this burden, the General Counsel must establish that he was substantially justified at each stage of the proceeding, i.e., at the time of the issuance of the complaint [and] taking the matter through hearing . . . An examination of the circumstances and evidence available to the General Counsel at these junctures is required in order to determine whether the General Counsel has carried his burden.

Galloway School Lines, Inc., 315 NLRB 473 (1994).[10] Beyond this, the Board has noted that it does not award fees "for individual complaint allegations on which an applicant might have prevailed," but instead weighs the complaint as a whole. *Glesby Wholesale, Inc.,* 340 NLRB 1059, 1060 (2003). The determination is to be made at "each successive phase or 'discrete substantive portion' of the litigation." *Glesby*, supra, at 1060. [Footnote and citations omitted.] In this case, that means that I must assess the General Counsel's conduct at the investigative stage and in the trial portion of the proceedings.

The Act itself establishes the standard for analysis of the General Counsel's conduct. It provides that an applicant is entitled to monetary relief unless the government's position was "substantially justified . . . on the basis of the administrative record, as a whole." 5 U.S.C. § 504(a)(1). One Circuit Court has commented that this concept is "far from self-defining."[11] Fortunately, both the Supreme Court and the Board have provided extensive commentary as to the proper interpretation of this phrase.

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applicant whose prior compliance with the jurisdictional requirements was found to be highly deficient.

[10] Because the General Counsel did not file exceptions to my original decision, I omitted from the quoted language of *Galloway* the Board's reference to the need to assess his conduct in choosing to file exceptions to an administrative law judge's decision.

[11] *Frey v. Commodity Futures Trading Com'n,* 931 F.2d 1171, 1174 (7th Cir. 1991).

In *Pierce v. Underwood*, 487 U.S. 552, 564 (1988), the Court took note of the "obvious need to elaborate upon the meaning of the phrase," observing that the term "substantial" has two conflicting definitions. Rejecting an interpretation of the term in this context as meaning "justified to a high degree," the Court held that Congress intended to employ the alternate connotation, "justified in substance or in the main." 487 U.S. at 565. Interestingly, the Court placed considerable reliance on the use of the term "substantial" in labor law, citing a venerable decision from the dawn of the Board's history, *Consolidated Edison Co. v. NLRB,* 305 U.S. 197 (1938).[12] In a common characteristic of judicial decisions, the Court's most useful observations regarding the meaning of the phrase are found in a footnote stating that,

> a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

487 U.S. at 566, fn. 2.

The Board has specifically called for the use of this footnote's formulation as guidance. *Teamsters Local Union No. 741,* 321 NLRB 886 (1996), citing *Jansen Distributing Co.,* 291 NLRB 801 (1988). Boiling the concept down to its essence, the Board has held that, when considering an award under the Act, "in weighing the unique circumstances of each case, a standard of reasonableness will apply." *Galloway School Lines, Inc.,* supra, at 473.

One additional aspect of the substantial justification standard merits some preliminary discussion—the phrase's relationship to the concept of prima facie proof. In my decision adverse to the General Counsel's position, I found insufficient evidence of unlawful animus on the part of the Company. In another EAJA case, the Board has noted that such a finding means that the General Counsel has failed to make out a prima facie case. *Tim Foley Plumbing Service, Inc.,* 337 NLRB 328, fn. 2 (2001). Nevertheless, it held that an award of EAJA fees did not necessarily flow from this conclusion. The proper inquiry was whether the General Counsel's evidence, "*if credited*, would have constituted a prima facie case in support of the complaint allegations."[13] 337 NLRB at 328. [Emphasis supplied.]

With this background in mind, I turn first to the assessment of the General Counsel's conduct during the investigative portion of this case. Having reviewed the record developed at

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[12] In that case, the Court held that substantial evidence consists of "more than a mere scintilla," but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 305 U.S. at 229.

[13] A failure to meet this threshold has sometimes been held to require an adverse finding under the Act. *SME Cement, Inc.,* 269 NLRB 763, fn. 1 (1983). Sometimes, but not invariably. See, *Lion Uniform*, 285 NLRB 249, 253 (1987), aff'd 905 F.2d 120 (6th Cir. 1990), cert. denied 498 U.S. 992 (1990). (observing that "such a showing is not always necessary to a finding of substantial justification.") I rely on *Tim Foley Plumbing,* supra, the Board's most recent statement on the issue, where it held that, "in order to avoid an EAJA award, the General Counsel must present evidence that, if credited, would constitute a prima facie case." 337 NLRB 328, 329 (2001). I also note that, in *Lion Uniform*, the Board stated that a finding that the General Counsel had presented sufficient evidence, if credited, to establish a prima facie case is not always sufficient to establish substantial justification. 285 NLRB at 253. It appears to me that the best approach is to rely on the overall standard of reasonableness without placing undue emphasis on technicalities involving the presentation of a prima facie case.

trial and the General Counsel's additional submissions related to the investigation, I conclude that the decision to file the complaint was premised on at least two key grounds, the sworn statement of job applicant Paul O'Brien, coupled with the unexplained pattern of hires during a period commencing in February 2004. In my view, it was entirely reasonable to infer from this evidence that the Company was engaging in unlawful discrimination.

Turning first to O'Brien's affidavit, there can be no doubt that, if credited, his account provided potent evidence of unlawful animus. In that affidavit, O'Brien unhesitatingly described highly damaging admissions allegedly made by the Company's owner, Joseph Izzo, admissions that strike at the heart of the legal issues in this case. According to O'Brien's affidavit, Izzo asked him to backdate his application for employment. O'Brien continued his account, stating that,

> [w]hen I asked why he had me backdate the application, Izzo said he had been having trouble with the union. He added that a large number of union electricians[,] maybe 20—30, had come down wearing union hats and filled out applications.

(Attachment B to GC's motion, p. 5.) O'Brien also reported that, because of these remarks by Izzo, he assumed that Izzo believed that he was a nonunion job applicant. (Attachment B, p. 13.)

This affidavit presented the General Counsel with a pointed accusation that the Company's owner had solicited a perceived nonunion job applicant to participate in a fraudulent attempt to create evidence designed to disguise discriminatory hiring practices. Indeed, underscoring the highly relevant nature of this account, it included a direct reference to salting activity by a large group of union members. Unless discredited, such evidence would be impossible to ignore.

During subsequent investigation, the General Counsel subpoenaed records indicating that, in a departure from past practice, no known union members had been hired during a period from February 25 through October 21, 2004. This period coincided with a pattern of organizing activity by the Union.

The General Counsel afforded the Applicant an opportunity to further develop the investigatory record prior to making a decision to file the complaint. The Company declined an invitation to provide an affidavit from its owner, the only person who could give an additional sworn account of the discussions with O'Brien and a comprehensive explanation of the hiring decisions made by the Company.[14] (See, Attachment F to GC's motion.) It also declined to submit a position statement. While there is certainly nothing improper in the decision not to provide such materials, this strategy created a situation comparable to that described by the administrative law judge in *C. I. Whitten Transfer Co.,* 312 NLRB 28 (1993). In a decision adopted by the Board, the judge noted that,

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[14] I recognize that Izzo did agree to an informal interview with the General Counsel's investigator. However, this is not at all the same thing. As the Board's *Casehandling Manual, Part One—Unfair Labor Practice Proceedings*, Section 10060, states, affidavits are "the preferred method of taking evidence from witnesses" and represent the "keystone" of an investigation because, "they set forth exactly what each witness recalls and provide a permanent record of the testimony, which can be relied upon in making a decision regarding the case."

> [i]f Respondent had made its witnesses available during the investigation, as it did during the hearing, and if it had supplied the investigator with the records it made available later, it is quite reasonable to believe that the complaint might never have issued. Respondent cannot now rely on its own lack of cooperation to support its application for attorney's fees pursuant to [the] Equal Access to Justice Act. [Footnotes omitted.]

312 NLRB at 29. See also, *Mathews-Carlsen Body Works, Inc.,* 327 NLRB 1167, 1168 (1999).

The practical effect of the Company's response to the investigation is described by counsel for the General Counsel:

> As a result of the Employer's failure to fully cooperate, the General Counsel had affidavit testimony from the charging party only . . . [T]he Government possessed no evidence to refute O'Brien's testimony, and no explanations of the hiring decisions reflected in the documents produced [under subpoena] by the Employer. In light of this, the General Counsel was justified in proceeding to trial based on the evidence in his possession.

GC's motion at p. 33. Because the General Counsel, after investigation, possessed unrebutted direct and circumstantial evidence of unlawful animus, I agree.

I must now examine the General Counsel's conduct during the course of the trial portion of the litigation. As had been developed during the investigation, the General Counsel's trial presentation consisted of two critical elements, presentation of O'Brien's direct testimony regarding unlawful animus and circumstantial evidence regarding the pattern of the Company's hiring decisions. General Counsel contended that the direct evidence coupled with the reasonable inferences to be drawn from the circumstantial evidence of the Company's practices met its burden of establishing that the refusal to hire the named job seekers was substantially motivated by unlawful animus.

Turning first to the direct evidence from O'Brien, I observe that what occurred at the hearing is a perfect illustration of the tribulations of the trial lawyer. It will be recalled that in his affidavit, O'Brien presented a straightforward account of Izzo's alleged explanation for seeking the backdating of the job application. Indeed, O'Brien asserted that Izzo linked the request for alteration of the document to the salting activity of a large group of union members. In a vivid demonstration of the powerful effect of our legal system's traditional methods, there was a substantial change in O'Brien's trial testimony. In this formal setting, accompanied by direct confrontation with the man he was accusing and subject to the test of cross-examination, O'Brien gave a far less direct and pointed account.

When called to testify, O'Brien reported that Izzo asked him to backdate his job application. He then testified that,

> I just asked him—if I remember correctly, I just asked him why he wanted it back dated. I thought it was kind of strange, which apparently he said that he was having some—hold on—I don't want to get this wrong. I think—problems with the Union was I believe the word that he used.

(Tr. 135.) O'Brien made absolutely no mention of any discussion about the large group of union salts described in his affidavit. In my original decision, I characterized this account of the most important conversation in the case as "a model of imprecision, qualification, and equivocation." (JD at fn. 21.) I noted that O'Brien's use of so many words of qualification strongly undermined the reliability of his testimony.

While it is clear that the General Counsel's trial presentation suffered from this change in O'Brien's account, the fact remains that a reasonable person could still conclude that, if credited, O'Brien's tale continued to provide direct evidence of unlawful animus on the part of Izzo. Indeed, if the fact finder chose to believe this version of events, it would color everything else in the case. The essence of O'Brien's story was that Izzo was prepared to falsify documents in order to cover up his unlawful discrimination. In other words, not only did Izzo possess unlawful animus against the Union and its supporters, he was also willing to defraud the administrative tribunal in order to get away with his misdeeds.

Weighing the highly equivocal nature of O'Brien's account at trial with a general assessment of O'Brien's credibility that included an appraisal of his pecuniary motivation, an evaluation of the trustworthiness of the contrary testimony of Izzo, and an examination of the inherent probabilities, I found that the General Counsel had failed to present credible direct evidence of animus. Nevertheless, it could have gone the other way. For example, in my original decision, I noted that Izzo also had "a clear personal, professional, and pecuniary interest in the outcome of this case." (JD at p. 17.) I opined that some of his testimony was "disingenuous," and that it "reflected a desire to serve his cause by drawing technical distinctions," including "the typical use of shading employed by highly interested parties in all sorts of litigation." (JD at pp. 17—18.) On balance, for reasons discussed at some length in my original decision, I chose to believe Izzo. It could have been otherwise. I clearly believe that it was reasonable for the General Counsel to put the conflicting testimony to the test of judicial analysis.

The other key portion of the General Counsel's presentation was the circumstantial evidence regarding the Company's hiring practices. In considering this evidence, I note at the outset that the General Counsel could reasonably have hoped that my view of the inferences to be drawn from the record would be shaped by O'Brien's testimony that Izzo was willing to use underhanded methods to disguise his conduct. Beyond this, I conclude that the General Counsel's arguments from the evidence were based on reasonable conclusions derived from consideration of the pattern of events.

In large measure, my decision not to accept the conclusions drawn from the record by the General Counsel stemmed from a fundamental difference of opinion about the time period under consideration. The General Counsel engaged in a highly focused examination of the Company's conduct in the wake of the Union's formal notification of its organizing campaign on February 16, 2004. I based my contrary conclusions on a more wide ranging examination, taking into account the Company's actions from the time it became aware of the organizing campaign through informal sources. In particular, I credited Izzo's testimony that his employees had kept him informed about the organizing campaign from its inception.[15] This uncontroverted testimony was also consistent with other evidence showing that the Company would have been aware of the Union's efforts well before February 16.

[15] There is nothing to suggest that, prior to trial, counsel for the General Counsel was aware that employees had discussed the organizing campaign with Izzo from its instigation.

In addition, as counsel for the Applicant notes in the application, I placed great weight on my own inference drawn from the absence of credible direct evidence of animus. The evidence showed that the Company had several employees who were union members. Those employees regularly reported to the Union's organizer regarding all aspects of the Company's behavior. Despite having such broad access to information about this relatively small employer, the Union did not allege that Company officials made any antiunion statements, lawful or otherwise; nor did the General Counsel contend that the Company committed any unfair labor practices against its employees, including the known union members among the workforce.

In sum, it is obvious that I found my own inferences from the circumstantial evidence to be more persuasive than those drawn by the General Counsel. However, I have no hesitation in concluding that the General Counsel's arguments were reasonable. Indeed, had I found O'Brien to be credible, the outcome of this case may well have been entirely different. The General Counsel's proposed inferences, when coupled with direct evidence of both unlawful animus and a willingness to fraudulently manipulate the record, would certainly have presented a compelling picture.

The General Counsel's trial presentation in this case rested on the same two basic elements that were presented in *Galloway School Lines, Inc.,* supra. In that case, the administrative law judge granted the employer's EAJA application. The Board reversed, noting that the judge's decision in favor of the employer in the unfair labor practice trial was based on his credibility determinations and, "on inferences from evidence that could reasonably have supported contrary inferences." 315 NLRB at 474. The Board went on to note that,

> [t]hese points are critical to the decision regarding substantial justification for the General Counsel's position, since in issuing complaint and proceeding through the trial, the General Counsel was acting without benefit of the judge's ultimate credibility resolutions and choices among possible inferences.

315 NLRB at 474. Similarly, in *Glesby Wholesale, Inc.,* supra, the Board found substantial justification where,

> the issue of the Applicant's motivation . . . was still in dispute at the end of the hearing, and reasonable minds could differ on the strength of the relevant evidence. Accordingly, the General Counsel was justified in waiting for the judge's decision.

340 NLRB 1059, 1061 (2003). The Board also placed significance on the fact that the General Counsel did not file exceptions once the judge resolved the credibility issues in favor of the employer. 340 NLRB at 1062. The circumstances in this case mirror those in the two cases just cited. I find that the General Counsel's conduct during the trial portion of these proceedings was both reasonable and substantially justified.

One of the characteristics involved in the adjudication of cases in a mature system of administrative law is the likelihood that a precedent will exist that bears telling similarities to the case under consideration. Over 20 years ago, the Board addressed an EAJA application in a "refusal to hire" case. The complaint against the employer had been dismissed due to the General Counsel's failure to meet his burden of demonstrating that unlawful animus was a substantial motivating factor in the refusal to hire any of the union's candidates for employment. Although there was circumstantial evidence suggestive of unlawful motivation, the only such direct evidence was testimony from one witness, Anthony Pento. That testimony was

discredited. On the other hand, the employer's testimony, while "uncorroborated" and "self-serving," was deemed believable. *Jim's Big M,* 266 NLRB 665, 666 (1983), aff'd. 742 F.2d 1446 (2nd Cir. 1984). On this record, the administrative law judge rejected the company's EAJA application, finding that the General Counsel's "maintenance of the allegations with respect to both Respondents depended upon difficult issues of credibility and fell deeply within permissible standards for governmental action." 266 NLRB at 666. The Board affirmed, noting that,

> As discussed by the Administrative Law Judge, the Board found that the evidence in the underlying case failed to establish a prima facie case based, in large part, on the absence of credited evidence of union animus by the Applicants. The Administrative Law Judge further pointed out, however, that, if credited, Anthony Pento's testimony relating to statements made by representatives of Applicant Big M that the new store would not be operated on a union basis would have been sufficient evidence of union animus to support a prima facie case. In these circumstances, we find that the position taken by the General Counsel was reasonable. [Citation omitted.]

266 NLRB at 665, fn. 1. I can find no meaningful distinction between the circumstances outlined in this precedent with its accompanying decisional rationale and the issues presented here. The result should be the same.

Conclusion of Law

The General Counsel has met his burden of establishing that his position during the investigative and trial portions of this proceeding was substantially justified on the basis of the administrative record as a whole.

On these findings and this conclusion of law, and on the entire record, I issue the following recommended:[16]

ORDER

IT IS ORDERED that the application for fees and expenses filed by Izzo Electric & Son, be and it hereby is dismissed.

Dated: Washington, D.C. December 9, 2005

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Paul Buxbaum
Administrative Law Judge

[16] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended order herein shall, as provided in Sec, 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.